Supreme Court, U.S.
FILED
JAN 22 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-989

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CITY OF NORFOLK, VIRGINIA, *et al.*,
Petitioners,

v.

HERBERT M. COLLINS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

BARBARA R. ARNWINE
FRANK R. PARKER *
BRENDA J. WRIGHT
ROBERT B. MCDUFF
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1400 Eye Street, N.W., Suite 400
Washington, D.C. 20005
(202) 371-1212

JAMES F. GAY
1317 East Brambleton Avenue
Norfolk, Virginia 23504
(804) 627-3100

* Counsel of Record

Attorneys for Respondents

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
PROCEEDINGS	1
STATEMENT OF THE CASE	3
REASONS WHY THE PETITION SHOULD BE DENIED	9
I. CONTRARY TO THE CITY'S ARGUMENT, THE COURT OF APPEALS DID NOT APPLY A PROPORTIONAL REPRESENTATION STANDARD	10
II. CONTRARY TO PETITIONERS' ARGUMENT, THE FOURTH CIRCUIT'S DEFINITION OF "REPRESENTATIVES OF CHOICE" IS COMPLETELY CONSISTENT WITH *GINGLES* AND THE DECISIONS OF OTHER COURTS OF APPEALS	13
III. CONTRARY TO PETITIONERS' ARGUMENT, THE COURT OF APPEALS CORRECTLY CONSIDERED BLACK ELECTORAL SUCCESSES AS "SPECIAL CIRCUMSTANCES" UNDER THIS COURT'S *GINGLES* DECISION	18
A. The Election of a Second Black Council Member After this Lawsuit Was Filed	18
B. The Repeated Reelection of Black Incumbents	20
CONCLUSION	22

TABLE OF AUTHORITIES

Cases *Page*

Brown v. Board of Commissioners of Chattanooga, 722 F. Supp. 380 (E.D. Tenn. 1989) 12
Campos v. City of Baytown, 840 F.2d 1240 (5th Cir. 1988), *cert. denied*, 109 S.Ct. 3213 (1989) .. 15
Carrollton Branch of NAACP v. Stallings, 829 F.2d 1547 (11th Cir. 1987), *cert. denied*, 108 S.Ct. 1111 (1988) 20, 21
Citizens for a Better Gretna v. City of Gretna, 834 F.2d 496 (5th Cir. 1987), *cert. denied*, 109 S.Ct. 3213 (1989) 15
Gingles v. Edmisten, 590 F. Supp. 345 (E.D. N.C. 1984) (three-judge court), *aff'd in part, rev'd in part sub nom. Thornburg v. Gingles*, 478 U.S. 30 (1986) 12, 15, 18
Gomez v. City of Watsonville, 863 F.2d 1407 (9th Cir. 1988), *cert. denied*, 109 S.Ct. 1534 (1989) .. 12, 20, 21
Jackson v. Edgefield County, South Carolina, School District, 650 F. Supp. 1176 (D.S.C. 1986) 12
LULAC v. Midland Independent School District, 812 F.2d 1494 (5th Cir.), *vac'd on rehearing en banc, district court decision aff'd*, 829 F.2d 546 (5th Cir. 1987) (*en banc*) 12
Sanchez v. Bond, 875 F.2d 1488 (10th Cir. 1989), *cert. pending*, No. 89-353 15
Thornburg v. Gingles, 478 U.S. 30 (1986) ..... 2, *passim*
Velasquez v. City of Abilene, 725 F.2d 1017 (5th Cir. 1984) 12
Windy Boy v. Big Horn County, 647 F. Supp. 1002 (D. Mont. 1986) 12
Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) (*en banc*), *aff'd sub nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976) 18

Statutes, Legislative History, and Rules

Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 ..... *passim*

TABLE OF AUTHORITIES—Continued

	Page
S. Rep. No. 97-417, 97th Cong., 2d Sess. (1982)	11
Rule 52(a), Federal Rules of Civil Procedure	19, 20
Rule 301, Federal Rules of Evidence	14
Other Authorities	
Engstrom, *The Reincarnation of the Intent Standard: Federal Judges and At-Large Election Cases*, 28 How. L. J. 495 (1985)	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-989

CITY OF NORFOLK, VIRGINIA, *et al.*,
Petitioners,

v.

HERBERT M. COLLINS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Herbert M. Collins, et al., seven black voters of the city of Norfolk, and the Norfolk Branch of the NAACP (who were plaintiffs below) respectfully request that this Court deny the petition for a writ of certiorari seeking review of the Fourth Circuit's judgment in this case. The Fourth Circuit's opinion is reported at 883 F.2d 1232 (4th Cir. 1989).

PROCEEDINGS

This case was last before this Court in 1986, after the district court had rejected plaintiffs' challenge to at-large city council elections in Norfolk and the Fourth

Circuit had affirmed that decision, one judge dissenting. 605 F. Supp. 377 (E.D.Va. 1984) (*Collins I*), *aff'd*, 768 F.2d 572 (4th Cir. 1985) (*Collins II*).[1] On plaintiffs' petition, this Court vacated the Fourth Circuit's decision and remanded for further consideration in light of the intervening decision in *Thornburg v. Gingles*. *Collins v. City of Norfolk*, 478 U.S. 1016 (1986) (*Collins III*).

On remand, the Fourth Circuit reversed the district court's decision, set forth the proper legal standards under *Thornburg v. Gingles*, 478 U.S. 30 (1986), for evaluating the proof presented, and remanded the case back to the district court for further proceedings. 816 F.2d 932 (4th Cir. 1987) (*Collins IV*). Although petitioners now challenge the Fourth Circuit's rulings in *Collins IV*, they failed to contest that decision at the time by filing a petition for rehearing or petition for certiorari in this Court, in effect acquiescing in that decision.

The district court once again rendered judgment for the city, 679 F. Supp. 557 (E.D. Va. 1988) (*Collins V*), and the Fourth Circuit reversed because the district court failed properly to apply the standards of *Thornburg v. Gingles* and of the Fourth Circuit's previous opinion in *Collins IV*. 883 F.2d 1282 (4th Cir. 1989) (*Collins VI*).

At the outset, it is important to understand what is not involved in this petition for review. Contrary to the city's first argument (Pet., pp. i, 3, 15, 17-22), this case does not involve any issue of whether Section 2 of the Voting Rights Act is violated simply because blacks have not attained seats in proportion to their percentage in the population. In both decisions the Fourth Circuit expressly rejected any use of a proportional representation standard, *Collins IV*, 816 F.2d at 935 ("the lack of

---

[1] For an analysis of the early proceedings in this case, see Engstrom, *The Reincarnation of the Intent Standard: Federal Judges and At-Large Election Cases*, 28 How. L. J. 495 (1985).

proportional representation alone does not establish a violation") (quoting *Thornburg v. Gingles*); *Collins VI*, 883 F.2d at 1243 ("But the complainants do not seek proportional representation, and the Act does not require it.").

Further, petitioners' second argument (Pet., pp. i, 23-26) rests on the completely untenable theory that in racially polarized elections in which black candidates preferred by over 70 percent and 90 percent of the black voters are defeated by white bloc voting, and white candidates with much less black support are elected instead, the white candidates who got the lower black vote percentages are the candidates of choice of the black voters. Until this case no court has ever embraced such a bizarre notion, the court of appeals properly reversed the district court on this issue, and there is no good reason why this issue requires the further attention of this Court.

STATEMENT OF THE CASE

Plaintiffs filed this lawsuit in 1983 challenging at-large city council elections in Norfolk, Virginia, for denying black voters an equal opportunity to elect candidates of their choice in violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. As the court of appeals noted (883 F.2d at 1235), Virginia has an extensive past history of racial discrimination affecting the right to vote, including the use of the poll tax and the literacy test to prevent blacks from registering and voting. For this reason, Virginia was one of six Southern states covered by Sections 4 and 5 of the Voting Rights Act when the Act was passed in 1965, and the state remains covered by those provisions today. The effects of this past discrimination in voting continue to be perpetuated in black underrepresentation on the city council and severe racially polarized voting patterns.

Norfolk is 35 percent black in population, 31 percent black in voting age population, and 35 percent black in registered voters. The city has a council-manager form

of government with seven city council members all elected citywide to staggered four-year terms. Usually, every two years either three or four seats are up for election (more if there is a vacancy), and this means that voters have three or four votes (or more depending on the number of vacancies) to cast in each election.

From 1912, when at-large elections were adopted, to 1968 the Norfolk City Council was all-white, and from 1968 to 1984 the seven-member city council never had more than one black member. Black voters were unable to elect a second black council member until 1984, one year after this lawsuit was filed and three weeks before the scheduled trial, and then only as a result of unusual white support after the mayor publicly announced in a newspaper interview, "After the election, the issue of black representation may become a moot point" (816 F.2d at 938). Plaintiffs filed single-member district plans showing that if Norfolk were divided up into seven single-member districts, blacks would have voting age population majorities in *three* of the seven districts.[2]

There is no dispute in this case that Norfolk City Council elections are characterized by severe racially polarized voting, which this Court termed "a key element of a vote dilution claim." *Gingles*, 478 U.S. at 55. At the most recent oral argument in the district court, the city conceded that under the *Gingles* definition, there is racially polarized voting in city council elections: "There

[2] Ex. P-52. Plan 1 contains three majority black districts that are 64 percent, 62 percent, and 57 percent black in VAP; Plan 2 has three districts that are 63 percent, 62 percent, and 55 percent black in VAP. The district court concluded that blacks would constitute a majority in "no more than two of the proposed wards" by requiring that districts must be 65 percent black in population to meet the *Gingles* standard (679 F. Supp. at 566). However, this Court in *Gingles* only required proof that "the minority group must be sufficiently large and geographically compact to constitute *a majority* in a single-member district." 478 U.S. at 50 (emphasis added; footnote omitted).

are indeed high correlations between the race of the voter and the way that voter votes" (Tr. Oral Argument, Dec. 16, 1987, p. 41). Defendants' own statistics set out in the attached appendices[3] show patterns of racially polarized voting equal to or more severe than those before this Court in *Thornburg v. Gingles*. In every city council election white voters overwhelmingly vote for white candidates (see Appendix 1, attached), and black voters mostly prefer black candidates (see Appendix 2). In no instance has any black candidate gotten a majority of the white vote. Indeed, the highest white vote percentage that any black candidate has gotten is 32 percent (Appendix 2), as compared to white crossover voting of up to 40 and 50 percent in *Gingles* (478 U.S. at 59). As in *Gingles*, white voters almost always rank black candidates sixth or seventh in the multicandidate field (see Appendix 3; cf. 478 U.S. at 59, 61 and n.30).

As a result, in seven of the ten city council elections from 1968 to 1986 candidates who were overwhelmingly supported by black voters (receiving 70 percent or more of the votes of black voters) were defeated, while in every election white-preferred candidates always won and no candidate who received more than 70 percent of the white vote has ever been defeated (Appendix 3). The voting statistics also show that from 1970 to 1984 black voters consistently expressed a preference for a second black city council member, and black-preferred candidates for a second seat regularly were defeated by white candidates preferred by the white voters (*id.*).[4]

---

[3] The racial voting statistics used in this brief and appendices are the defendants' statistics, based on homogeneous precinct analysis, which were accepted by the district court (679 F. Supp. at 572) and the court of appeals.

[4] The city's statistics that 8 of 14 (and 7 of 13) black candidates who received a majority of the black votes were elected (Pet., pp. 3, 4) in actuality only means that from 1968 to 1984 the one black incumbent (Joseph Jordan from 1968 to 1977, Joseph Green after

Thus, when this case reached the Fourth Circuit the following factors which this Court in *Thornburg v. Gingles* held were critical to proving a Section 2 violation (478 U.S. at 50-51) were either resolved by the district court against the city or undisputed: (1) If Norfolk were subdivided into single-member districts, blacks would constitute voting majorities in two or three districts (679 F. Supp. at 566); (2) black voters are politically cohesive (*id.*); and (3) voting in Norfolk City Council elections is racially polarized. Every factor critical to a Section 2 violation had been resolved in plaintiffs' favor except one: Whether the racially polarized voting that prevails in city council elections is "legally significant." That is, the issue was whether plaintiffs had proven "that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed [citations omitted]—usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 51.

In its prior decision the Fourth Circuit, instructed by this Court to apply *Gingles*, was faced with a conflict between the district court's conclusions concerning a high degree of minority electoral success and the undisputed fact that in two critical elections upon which the district court relied (1974 and 1980) the candidates who received the highest black vote percentages were defeated (see Pet., p. 4). Based on this Court's *Gingles* definition that legally significant bloc voting occurs when "the minority's preferred candidate" is defeated, the Fourth Cir-

---

first being appointed to the council in 1977) repeatedly was reelected, a second black council member was elected in 1984, and both have been reelected since. Under *Gingles* the reelection of black incumbents and the election of a second black representative during the pendency of litigation are "special circumstances" that do not diminish a Section 2 claim (886 F.2d at 1241-43) (see discussion in Section III, *infra*). The city's discussion also omits the critical fact that from 1968 to 1984 every black candidate who was not an incumbent lost.

cuit adopted the logical presumption that under the facts of this case black voters have not elected their "preferred candidate" when candidates who receive the highest black vote perecntages are defeated by candidates who receive less black support even though the winning candidates win more than 50 percent of the votes of black voters. *Collins IV*, 816 F.2d at 937.

No complex statistical methodology is needed to determine that when one candidate receives 73.4 percent of the black vote (as Bond did in 1974)—and is defeated—and two other candidates who receive only 58.2 percent and 56.5 percent of the black vote are elected (Howell and Staylor), black voters have not been successful in electing their "preferred candidate."

The Fourth Circuit also instructed the district court to consider whether "special circumstances," including the pendency of this lawsuit, resulted in the election of a second black council member in 1984. The Fourth Circuit ruled that if the mayor's statement and conduct resulted in "unusual white support for the black candidate in 1984, the legal significance of his success should be diminished." 816 F.2d at 938. The Fourth Circuit's decision in *Collins IV* (written by Circuit Judge Sam J. Irvin, III) was unanimous, and the city did not petition for rehearing or seek review of that ruling in this Court.

On remand, the district court readopted its prior, reversed opinion (678 F. Supp. at 562) and ruled once again that "black-preferred candidates usually win" (*id.* at 568). This conclusion was based on (1) counting two white candidates, Howell and Staylor in 1974 and Howell in 1980, as "black-preferred candidates" even though in both elections black candidates with higher black vote percentages lost, and (2) not discounting the election of a second black council member in 1984 after this lawsuit was filed or the repeated reelection of black incumbents as resulting from "special circumstances." 679 F. Supp. at 572-80. The district court all but ignored the Fourth

Circuit's instruction to presume that the candidates who received the highest percentages of the black votes are black voters' preferred candidates,[5] ignored the extensive evidence that supported the presumption, and held that the presumption had been rebutted (*id.* at 574-75). The district court also refused to discount the election of a second black council member in 1984, finding that "there was no evidence of unusual white voting patterns in the 1984 election" (*id.* at 577), and refused to hold that the 100-percent reelection rate of black incumbents was a special circumstance under *Gingles* (*id.* at 579).

The Fourth Circuit, after an intensive review of the factual record presented, held that the district court's conclusion that black-preferred candidates usually win was erroneous and that the *Gingles* definition of legally significant racially polarized voting had been met in this case. First, the court of appeals held that the district court failed properly to identify the minority's preferred candidates in the 1974 and 1980 elections. 883 F.2d at 1238-41. The defeat of the black-preferred candidates in 1974 and 1980, coupled with repeated defeat of all the candidates supported by overwhelming percentages of black votes for a second seat on the city council from 1968 to 1984, demonstrated that white bloc voting usually defeats the minority's preferred candidate in city council elections. *Id.* at 1240-41.

The Fourth Circuit also held that the district court's finding that there was no unusual white support for the second black council member in 1984 was "clearly erroneous," and his election was the result of "special circumstances" (*id.* at 1241-42). Under this Court's listing

---

[5] During oral argument in the district court, when plaintiffs' counsel, defending the Fourth Circuit's ruling, made the point that the statutory language adopted by Congress prohibits any electoral system that denies black voters an equal opportunity to elect candidates of their choice, the district judge responded: "Well, it doesn't say their top choice; it says their choice." Tr., Dec. 16, 1987, p. 62.

of "special circumstances" in *Gingles*, which includes incumbency (478 U.S. at 57), the Fourth Circuit also concluded that the district court contradicted *Gingles* by failing to count incumbency as one of the "special circumstances" that "do not negate the existence of the white bloc voting that has characterized the at-large elections in Norfolk" (*id.* at 1243).

REASONS WHY THE PETITION SHOULD BE DENIED

This case, which has now been litigated continuously for seven years and which already has been reviewed once by this Court and three times by the Fourth Circuit, does not present any issue requiring further review by this Court. The Fourth Circuit's decision relies heavily on this Court's decision in *Thornburg v. Gingles*, is entirely consistent with *Gingles*, and does not conflict with any court of appeals decision. The undisputed voting statistics clearly demonstrate that at-large city council elections deny black voters an equal opportunity to elect candidates of their choice, and this meets the test of the statute, 42 U.S.C. § 1973(b), and this Court's decision in *Thornburg v. Gingles* for proving a Section 2 violation.

The city's principal contention, that the Fourth Circuit found a Section 2 violation because black voters have not elected representatives "in proportion to their percentage in the voting population" (Pet., p. 15), is directly contradicted by the Fourth Circuit's decision itself which specifically rejects such a proportional representation standard. Moreover, the facts of record simply will not support a determination of that question by this Court.

Similarly, the city's contention that legally significant bloc voting has not been proven in this case because "the white cross-over vote has combined with the black vote to elect the black-preferred candidates *most* of the time" (Pet., p. 15) is an erroneous factual assertion that the Fourth Circuit has twice rejected, 816 F.2d at 937; 883

F.2d at 1238-41, and is unworthy of this Court's review. The Fourth Circuit's ruling on this issue is entirely consistent with this Court's *Gingles* decision and the decisions of other courts of appeals.

I. CONTRARY TO THE CITY'S ARGUMENT, THE COURT OF APPEALS DID NOT APPLY A PROPORTIONAL REPRESENTATION STANDARD.

Petitioners are wrong when they argue that the Fourth Circuit applied a proportional representation standard in this case (Pet., pp. 15, 17-22). Throughout this extended litigation, the Fourth Circuit repeatedly has rejected any use of a proportional representation standard for determining a Section 2 violation. 768 F.2d at 573 n.1 (quoting statute); 816 F.2d at 935 (quoting *Gingles*). In its latest decision, Fourth Circuit quoted the statute with its proviso against establishing a right to proportional representation (883 F.2d at 1234) and expressly stated: "But the complainants do not seek proportional representation, and the Act does not require it" (*id.* at 1243).

Nor does the majority decision have the effect of establishing a claim to proportional representation. Contrary to the city's argument, the Fourth Circuit's conclusion regarding legally significant polarized voting does not rest exclusively on the inability of black voters to elect a minority-preferred candidate to a second council seat. The Fourth Circuit's holding also is based on the defeat of black-preferred candidates in 1974 and 1980, as well as the fact that the few black electoral successes were due to special circumstances such as incumbency and the pendency of this lawsuit. To the extent that black voters' inability to elect a second black-preferred council member was one of several factors in the Fourth Circuit's analysis, it does not imply a proportional representation requirement, but merely effectuates the Congressional intent of determining whether black voters have an equal opportunity with white voters in Norfolk to elect candidates of their choice.

There is nothing in the Voting Rights Act that restricts the right of protected minority voters to elect candidates of their choice to only one seat. As this Court noted in *Gingles*, the legislative history of Section 2 clearly states Congress' intent that "the election of a few minority candidates does not necessarily foreclose the possibility of dilution of the black vote." 478 U.S. at 75 (quoting S. Rep. No. 97-417, 97th Cong., 2d Sess. 29 n. 115 (1982)). Thus, this Court concluded that "the language of § 2 and its legislative history plainly demonstrate that proof that some minority candidates have been elected does not foreclose a § 2 claim." *Id.*

Under this standard, even though some minority candidates have been elected, courts may still inquire whether minority voters are denied an equal opportunity to elect candidates of their choice and whether the election of some minority candidates is the result of "special circumstances." In *Gingles* this Court affirmed (with one exception) the district court's findings of Section 2 violations despite the fact that black candidates had been elected in at-large voting *in every district* contested in the Supreme Court appeal (and in one district, two had been elected in 1982). 478 U.S. at 58-61, 82, Appendix B (the contested districts were House Districts 21, 23, 36, and 39 and Senate District 22).[6] This Court rejected the argument, advanced by petitioners here, that the election of some black candidates shows that black voters have an equal opportunity to elect candidates of their choice in at-large voting and to hold otherwise would constitute a proportional representation test. See 478 U.S. at 74-76. The Fourth Circuit's decision also is consistent with decisions of other courts which have found a Section 2 violation or reversed adverse district court rulings even

---

[6] The only district in which this Court did not find a violation was House District 23, in which black voters had had proportional representation since 1972.

though minority representatives had been elected to office under the challenged at-large system.[7]

The petitioners' other arguments against the Fourth Circuit's decision made as part of their proportional representation argument (Pet., pp. 20-22) are similarly unfounded. The Fourth Circuit's ruling does not result in any *per se* rule against at-large elections (Pet., p. 20). Whether or not there is a Section 2 violation still depends upon whether the facts of the case meet the legal standards set forth by this Court in *Gingles*. Further, as the district court determined in *Gingles*, whether or not at-large election systems serve "important political values" (Pet., p. 20) is a policy decision resolved by Congress. In enacting Section 2, Congress took into account these considerations but made the "deliberate political judgment" that they were out-weighed by the need to eliminate racial discrimination in the electoral process. *Gingles v. Edmisten*, 590 F. Supp. 345, 356-57 (E.D. N.C. 1984) (three-judge court), *aff'd in relevant part sub nom. Thornburg v. Gingles*. The Fourth Circuit's decision, by requiring proof of the discriminatory impact of at-large voting, is consistent with that congressional judgment.

Contrary to the city's argument (Pet., p. 22) the Fourth Circuit did not assume that only black candidates can represent black voters. In both *Collins IV* and *Collins VI* the Fourth Circuit concluded that the race of the candidates was not determinative, and that black voters' preferences are determined not by the race of the candidates

---

[7] See, e.g., *Gomez v. City of Watsonville*, 863 F.2d 1407, 1409 n.1 (9th Cir. 1988), *cert. denied*, 109 S.Ct. 1534 (1989); *LULAC v. Midland Independent School District*, 812 F.2d 1494, 1496 (5th Cir.), *vac'd on rehearing en banc, district court decision finding Section 2 violation aff'd*, 829 F.2d 546 (5th Cir. 1987); *Velasquez v. City of Abilene*, 725 F.2d 1017, 1019 (5th Cir. 1984); *Brown v. Board of Commissioners of Chattanooga*, 722 F. Supp. 380, 394 (E.D. Tenn. 1989); *Jackson v. Edgefield County, South Carolina, School District*, 650 F. Supp. 1176, 1190-93 (D.S.C. 1986); *Windy Boy v. Big Horn County*, 647 F. Supp. 1002, 1018-20 (D. Mont. 1986).

but by the percentages of the black votes they received. *Collins IV*, 816 F.2d at 936 n.3, 937 and n.5; *Collins VI*, 883 F.2d at 1237 n.7, 1238. In its latest decision, the Fourth Circuit specifically referred to the defeat of a white candidate, Braxton Hill, as proof of black voters' inability to elect a second council member (883 F.2d at 1241). In any event, since in most of the elections the black voters' first choice for a second council seat was a black candidate (see Appendix 3), this is not a case requiring resolution of this issue.

In sum, the city's claim that the Fourth Circuit applied a proportional representation standard is contradicted by the opinions in this case and fails to present a substantial question for review.

II. CONTRARY TO PETITIONERS' ARGUMENT, THE FOURTH CIRCUIT'S DEFINITION OF "REPRESENTATIVES OF CHOICE" IS COMPLETELY CONSISTENT WITH *GINGLES* AND THE DECISIONS OF OTHER COURTS OF APPEALS.

Petitioners' claims of minority electoral success boil down to the contention that the election of two white candidates with majority black support (Howell and Staylor in 1974 and Howell in 1980)—as well as the successive reelection of one black incumbent and the election of a second black incumbent in 1984 (discussed *infra*)—*ipso facto* negate plaintiffs' Section 2 claim and offset the numerous instances in which black-preferred candidates who received from 70 percent to over 90 percent of the black votes were defeated. As discussed above, this argument is inconsistent with the legislative history of Section 2 and the teachings of *Gingles* that the election of some minority candidates does not foreclose a Section 2 claim.

Regarding the 1974 and 1980 elections, the city's claim that the Fourth Circuit adopted too restricted a definition of who constitutes black voters' "representatives of choice"

(Pet., pp. 23-26) on the facts of this case fails to present a substantial issue for review. The Fourth Circuit's ruling on this issue is firmly grounded in the statutory language of Section 2 and the *Gingles* decision. Section 2 states that a violation is established if the challenged election system provides minority voters with less opportunity than others "to elect representatives of their choice," 42 U.S.C. § 1973(b). In *Gingles* this Court defined "the essence of a § 2 claim" as a case in which a challenged election practice "interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect *their preferred representatives.*" 478 U.S. at 30 (emphasis added). Similarly, the question of legally-significant polarized voting hinges on the usual defeat of "the minority's preferred candidate." *Id.* at 51.

Thus, the Fourth Circuit was only following the language of the statute and this Court's formulation of the proper legal test when it adopted a logical and commonsense interpretation of the term "minority's preferred candidate." The court of appeals correctly took it to imply that the mere election of a candidate with more than 50 percent of the black votes does not necessarily count as a minority electoral success when (a) voters can vote for more than one candidate on the ballot and (b) other candidates who receive significantly higher black vote percentages are defeated in the same election. 816 F.2d at 935 (*Gingles* focuses on "the *actual results* of minority-preferred candidates in winning elections."), 937. The Fourth Circuit did not establish this as an immutable legal principle, but only as a rebuttable presumption subject to the standards and limitations of Rule 301, Fed. R. Evid., (883 F.2d at 1238) under which the burden of proof remains with the plaintiffs. The presumption has a sound basis because it is rationally related to the issue to be proved and provides an objective and verifiable standard for courts to determine whether minority-preferred candidates have been elected or defeated.

As *Gingles* and the Fourth Circuit's decisions make clear (see 883 F.2d at 1239-40), the fact that less-preferred candidates can still receive black voting majorities is a particular function of the multiple-seat, multiple-vote voting system under which voters can cast ballots equal to the number of seats to be filled. The district court in *Gingles* noted that under such a system, black voters may single-shot vote but only by forfeiting their right to vote for a full slate of candidates. *Gingles v. Edmisten*, 590 F. Supp. at 369. On the other hand, if black voters want to use their full voting power, they must also cast ballots for less-preferred candidates who are not necessarily their candidates of choice, some of whom may end up winning with black majorities.

There is a consensus among the courts of appeals—reflected in decisions which this Court declined to review last term—that simply because a candidate receives more than 50 percent of the black votes does not necessarily make that candidate the black-preferred candidate. As the Fifth Circuit held in *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496, 502 (5th Cir. 1987), *cert. denied*, 109 S.Ct. 3213 (1989): "Significance lies in the fact that the black candidate preferred by the minority was defeated by white bloc voting. That blacks also support white candidates acceptable to the majority does not negate instances in which white votes defeat a black preference." Similarly, in *Campos v. City of Baytown*, 840 F.2d 1240, 1245 (5th Cir. 1988), *cert. denied*, 109 S.Ct. 3213 (1989), the Fifth Circuit rejected the argument that "any time a candidate gets a majority of the minority votes he is the 'chosen representative' of the minority group." Contrary to petitioners' argument, these Fifth Circuit decisions support the Fourth's Circuit's ruling and were cited by the Fourth Circuit in support of its application of this standard (883 F.2d at 1240).[8]

[8] The Tenth Circuit's opinion in *Sanchez v. Bond*, 875 F.2d 1488 (10th Cir. 1989), *cert. pending*, No. 89-353, is not inconsistent with

Petitioners then argue that once the Fourth Circuit defined who constitutes the "minority's preferred candidate," the court of appeals misapplied its own definition developed in this case. (Pet., pp. 25-26). Whether or not this presumption was rebutted was an issue for the court of appeals to determine on the factual record presented in this case and does not merit Supreme Court review. The Fourth Circuit was correct that the district court failed properly to apply this legal standard because it treated all successful candidates who received more than 50 percent of the black vote as "black-preferred candidates" without giving any weight to the rank order of preferences or the differences in black vote percentages among the candidates who won black majorities. See 679 F. Supp. at 568, 574-75.

Indeed, the district court's ruling is entirely unprecedented. Until this case, no court has ever held that in a white-black contest with racially polarized voting, as between a black candidate who receives over 73 percent of the black vote and a white candidate who receives only 58 percent, that the white candidate is the preferred candidate of black voters. While petitioners attempt to argue that the court of appeals' decision creates a startling new rule of law, precisely the opposite is true. The court of appeals properly corrected the district court's anomalous holding.

The Fourth Circuit also is correct that the city's proof was not sufficient to overcome the presumption established by defendants' own statistics that Bond in 1974 and Butts in 1980 were black voters' preferred candidates. 883 F.2d at 1238-40. Endorsements by one black endorsement group, the Concerned Citizens organization, do not necessarily rebut this presumption because the group did not rank its endorsements in order of prefer-

---

this standard. In that case there was no finding that in the same election, Anglo candidates won with Hispanic majorities but Hispanic candidates who received higher Hispanic vote percentages lost.

ence and because the black vote percentages received by the candidates is a better measure of the strength of black electoral support than mere endorsements by one group, which may or may not reflect the preferences of the entire black community. Similarly, the fact that a few minor black candidates got lower black vote percentages than Staylor and Howell is immaterial to the issue of whether Bond and Butts were the preferred candidates of the black voters over Howell and Staylor. 883 F.2d at 1238.

Further, evidence that the district court ignored in its opinion clearly demonstrates that Howell and Staylor were not the black voters' representatives of choice: (1) black voters preferred the black candidates who lost over the white candidates who won by substantial differences of 15 to 20 percentage points; (2) black community leaders, including the black incumbent council member, did not consider Howell and Staylor to be black community representatives, nor did Howell or Staylor consider themselves black community representatives;[9] and (3) after they won with black majorities, both Howell (in 1984) and Staylor (in 1978) lost their black majorities in subsequent elections yet were reelected with white majorities, showing both that they were not black voters' representatives of choice and were not electorally accountable to the black voters. 883 F.2d at 1238-39.

The court of appeals' definition of who constitutes the minority's preferred candidate and representative of choice on the facts of this case does not present a substantial issue requiring review by this Court.

---

[9] Howell's and Staylor's substantive views on issues of concern to the black community, which petitioners contend were irrelevant (Pet., pp. 25-26), were indeed relevant to whether they considered themselves black community representatives and whether they were responsive to black interests. The legislative history of Section 2 indicates that whether elected officials are responsive to the minority community is one evidentiary factor relevant to a Section 2 violation. *Gingles*, 478 U.S. at 45.

III. CONTRARY TO PETITIONERS' ARGUMENT, THE COURT OF APPEALS CORRECTLY CONSIDERED BLACK ELECTORAL SUCCESSES AS "SPECIAL CIRCUMSTANCES" UNDER THIS COURT'S *GINGLES* DECISION.

In *Gingles* this Court held that the election of some black candidates does not negate a Section 2 claim when it results from such "special circumstances" as the absence of an opponent, incumbency, and bullet voting, 478 U.S. at 57, 60-61, or when it occurs only after a vote dilution lawsuit has been filed, *id.* at 76. When these special circumstances are present, the electoral success of some black candidates does "not negate other evidence, derived from all of the elections . . . . that legally significant racially polarized voting exists . . ." *Id.* at 60.

A. The Election of a Second Black Council Member After this Lawsuit Was Filed.

Contrary to petitioners' argument (Pet., pp. 26-27), the court of appeals correctly concluded that the election of a second black council member, the Rev. John Foster, after this lawsuit was filed and three weeks before the trial in 1984 did not foreclose plaintiffs' vote dilution claim, and that conclusion was not based on any alleged proportional representation standard. As the Fourth Circuit noted in its prior opinion (816 F.2d at 938), the 1984 election was abberational.

> Never before in the history of the city had two black councilmen served simultaneously. Nevertheless, the mayor supported a second black candidate for the first time. He coupled his unprecedented support with the public statement, "After the election, the issue of black representation may become a moot point." [10]

[10] This is stronger evidence of the impact the election of a black candidate might have on pending vote dilution litigation than that described in any reported case. See *Gingles v. Edmiston*, 590 F. Supp. at 367; *Zimmer v. McKeithen*, 485 F.2d 1297, 1307 (5th Cir. 1973) (*en banc*), *aff'd sub nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976).

The Fourth Circuit therefore instructed the district court to determine whether the mayor's conduct and statement produced any "unusual white support for the black candidate in 1984," and if it did, to diminish the legal significance of that election. 816 F.2d at 938.

The Fourth Circuit is correct that the district court's finding that there was "no evidence" of unusual white support for Foster in the 1984 election (679 F. Supp. at 577) was contrary to the overwhelming weight of the evidence and clearly erroneous within the meaning of Rule 52. 883 F.2d at 1241-42. First, Foster, the black candidate, for all practical purposes was unopposed (itself a special circumstance under *Gingles*) because there were only two competitive white candidates and three seats were open. One of the city's own witnesses described the 1984 election as "unique." The "west side group," an all-white slating group with which the mayor was affiliated, endorsed only two candidates when three seats were vacant. 883 F.2d at 1241-42. The voting statistics themselves confirm that there were only two competitive white candidates in the race who got white majorities, despite the fact that three seats were open and there were six white candidates (Appendix 3).

Second, the city's own statistics show that Foster got an unusually high level of white votes. Foster's 26.6 percent white crossover vote—which provided him the margin of victory—was by far the highest percentage received by any nonincumbent black candidate since 1968 and the fourth highest received by any black candidate—incumbent or nonincumbent—in city council elections. Foster's white crossover vote was 90 percent higher than the highest white crossover vote previously cast for a nonincumbent black candidate. 883 F.2d at 1242.[11]

[11] Defendants own statistics which the district court credited also show that in 1984 white voters, who normally ranked black candidates fifth, sixth, or seventh, ranked Foster, the black candidate, *third* among all the candidates in the election. In no other election

The "clearly erroneous" rule, while it requires careful deference to district court findings of fact, does not completely insulate district court findings from appellate review, and appellate courts in voting rights cases retain the authority under Rule 52(a) to reverse district court findings that are clearly erroneous. *Gingles*, 478 U.S. at 77-79; *Gomez v. City of Watsonville*, 863 F.2d at 1414, 1416; *Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547, 1558-59 (11th Cir. 1987), *cert. denied*, 108 S.Ct. 1111 (1988).

B. The Repeated Reelection of Black Incumbents.

The court of appeals was correct to hold, on the district court's own finding, that incumbency conferred a special advantage on black incumbents that did not undermine the other evidence of legally significant polarized voting. 883 F.2d at 1243. The district court found that for black candidates incumbency was a significant predictor of electoral success: "the reelection rate for black incumbents is 100 percent, which is greater than that of whites" (679 F. Supp. at 579). From 1968 to 1984 no black candidate who was not an incumbent was elected,[12] and since 1984 only black incumbents have won. Except for 1968 and 1984, the only black candidates whites have been willing to vote for in sufficient numbers to get them elected have been black incumbents. Nonetheless, no black incumbent has ever received more than 32 percent of the white votes.

Petitioners are wrong to suggest that there was nothing abberational about the election of black incumbents (Pet., p. 27), since, apart from 1968 and 1984, those

---

has a black candidate come in third among white voters, except for one (1976) (see Appendix 3).

[12] In 1977 the single black council member, Joseph Jordan, resigned and another black, the Rev. Joseph Green, was appointed by the council to the vacancy. Thus, when Green ran for the seat in 1978 he was running as an incumbent.

were the only black candidates who won. The district court's finding on which they base their argument (*id.*) that white voters consistently have been willing "to re-elect black incumbents and to elect other blacks" (679 F. Supp. at 579) is factually wrong since black nonincumbents have almost always lost.

Since the court of appeals' rulings on these black electoral successes are completely consistent with this Court's rulings in *Gingles*, they fail to present an issue for review.

There is nothing in the court of appeals' decision that represents a departure from the directions this Court gave to the court of appeals in 1986 to reconsider this case according to the standards set forth in *Thornburg v. Gingles*. In reversing the district court's decision, the Fourth Circuit carefully followed the *Gingles* legal standards, and its decision does not conflict with any other court of appeals' decision.

Petitioners are wrong when they suggest that this case is the first post-*Gingles* case in which a court of appeals reversed a district court finding of no Section 2 violation (Pet., p. 29). This also occurred in two cases they cite in their petition, *Gomez v. City of Watsonville* and *Carrollton Branch of NAACP v. Stallings*, and this Court declined to review both of those decisions. Petitioners also are wrong when they argue that the Fourth Circuit's decision imperils all at-large election systems. It only imperils at-large election systems that deny minority voters an equal opportunity to elect candidates of their choice to office, and this is what Congress intended in enacting Section 2 of the Voting Rights Act.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

BARBARA R. ARNWINE
FRANK R. PARKER *
BRENDA J. WRIGHT
ROBERT B. MCDUFF
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1400 Eye Street, N.W., Suite 400
Washington, D.C. 20005
(202) 371-1212

JAMES F. GAY
1317 East Brambleton Avenue
Norfolk, Virginia 23504
(804) 627-3100

* Counsel of Record

Attorneys for Respondents

APPENDICES

APPENDIX 1

All Candidates Who Received More Than 50 Percent of the Votes of White Voters, 1968-1986.

Name	Race	Year	White %	Black %
Leafe	W	1984	86.3	19.6
Andrews	W	1982	79.9	5.8
Thomas	W	1976	79.0	1.6
Phillips	W	1976	77.9	2.9
Staylor	W	1982	75.3	1.6
Barfield	W	1968	72.7	4.1
Andrews	W	1986	72.6	38.4
Andrews	W	1978	72.2	43.5
Summers	W	1982	72.1	2.1
Thomas	W	1980	71.3	4.1
Ballard	W	1968	70.0	3.5
Howell	W	1984	68.8	39.8
Leafe	W	1980	68.1	1.7
Staylor	W	1978	67.5	1.7
Fraim	W	1986	67.0	29.8
Summers	W	1970	66.8	5.5
Staylor	W	1974	66.8	56.5
Summers	W	1978	64.6	4.0
Middleton	W	1978	64.1	3.3
Schweitzer	W	1968	63.7	4.9
Hughes	W	1970	63.2	8.1
Wright	W	1986	60.3	3.8
Hurst	W	1972	59.0	35.6
Andrews	W	1974	58.0	16.7
Nusbaum	W	1970	57.9	10.1
Phillips	W	1980	56.3	2.7
Hill	W	1972	55.6	32.2
Martin	W	1970	55.1	10.8
Summers	W	1974	51.1	7.6
Phillips	W	1986	50.3	29.?

Source: Defendants' statistics, Exs. D-470A-470I 1968-84; stipulation of the parties (1986).

APPENDIX 2

All Candidates Who Received More Than 50 Percent of the Votes of Black Voters, 1968-1986.

Name	Race	Year	White %	Black %
Jordan	B	1972	22.3	98.3
Jordan	B	1976	24.3	97.3
Green	B	1978	32.2	96.1
Butts	B	1980	9.5	92.9
Walton	B	1970	14.0	92.4
Jordan	B	1968	28.7	91.9
Green	B	1986	27.3	90.3
Green	B	1982	31.1	88.2
Butts	B	1982	11.2	87.6
Harris	B	1986	4.8	84.1
Foster	B	1984	26.6	79.9
Hill	W	1976	20.0	76.3
Hurst	W	1976	21.7	75.6
Bond	B	1974	7.6	73.4
Howell	W	1980	31.7	72.9
Butts	B	1984	24.2	72.1
Howell	W	1978	26.6	68.5
Howell	W	1974	38.2	58.2
Staylor	W	1974	66.8	56.5

Source: Defendants' statistics, Exs. D-470A-470I (1968-84); stipulation of the parties (1986).

APPENDIX 3

All Candidates Who Received More Than 20 Percent of White or Black Votes for Each Election.

	White Votes				Black Votes			
	For White Candidates		For Black Candidates		For White Candidates		For Black Candidates	
1968 (3)	Ballard-E	70.0					Jordan-E	91.9
	Barfield-E	72.7						
	Schweitzer	63.7						
	Willis	32.1						
					Willis	28.9		
			Jordan-E	28.7				
					Schweitzer	4.9		
					Barfield-E	4.1		
					Ballard-E	3.5		
1970 (6)	Summers-E	66.8					Walton	92.4
	Hughes-E	63.2						
	Nusbaum-E	57.9						
	Martin-E	55.1						
	Hill-E	49.7						
	Perry	46.2						
	Hurst-E	43.2						
					Hurst-E	40.8		
					Gottlieb	34.9		
					Hanckel	33.7		
					Kissinger	31.2		
	Gottleib	28.3						
	Willis	28.0						
					Sichta	26.5		
	Hanckel	25.3						
	Ogg	21.0						
			Walton	14.0				
	Kissinger	10.6			Martin-E	10.8		
	Sichta	8.2			Nusbaum-E	10.1		
					Hughes-E	8.1		
					Willis	6.4		
					Hill-E	6.3		
					Perry	5.7		
					Summers-E	5.5		
					Ogg	1.5		

E- Elected

Source: Defendants' statistics, Exs. D-470A-470I (1968-84); stipulation of the parties (1986).

	White Votes				Black Votes			
	For White Candidates		For Black Candidates		For White Candidates		For Black Candidates	
1972 (3)	Hurst-E	59.0					Jordan-E	98.3
	Hill, I.-E	55.6						
	Hill B.	44.6						
	Parsons	39.8						
					Hurst-E	35.6		
					Hill, I.-E	32.2		
	Wallace	26.3						
			Jordan-E	22.3				
					Hill, B.	10.0		
					Parsons	6.1		
					Wallace	0.8		
1974 (4)							Bond	73.4
	Staylor-E	66.8						
	Andrews-E	58.0			Howell-E	58.2		
					Staylor-E	56.5		
	Summers-E	51.1						
	Hughes	40.8						
	Howell-E	38.2						
							Reid	36.4
	Blassingham	23.2						
					Andrews-E	16.7		
			Bond	7.6	Summers-E	7.6		
			Reid	3.0	Hughes	1.1		
					Blassingham	0.9		
1976 (3)	Thomas-E	79.0					Jordan-E	97.3
	Phillips-E	77.9						
					Hill	76.3		
					Hurst	75.6		
			Jordan-E	24.3				
	Hurst	21.7						
	Hill	20.0						
					Phillips-E	2.9		
					Thomas-E	1.6		
1978 (5)	Andrews-E	72.2					Green-E	96.1
					Howell-E	68.5		
	Staylor-E	67.5						
	Summers-E	64.6						
	Middleton	64.1						
					White	42.8		
					Copeland	45.0		
					Andrews-E	43.5		

	White Votes				Black Votes			
	For White Candidates		For Black Candidates		For White Candidates		For Black Candidates	
1978	(continued)							
	White	40.5						
			Green-E	32.2				
	Copeland	32.0						
	Howell-E	26.6						
					Summers-E	4.0		
					Middleton	3.3		
					Staylor-E	1.7		
1980	Thomas-E	71.3					Butts	92.9
(3)	Leafe-E	68.1						
	Phillips	56.3			Howell-E	72.9		
							Banks	34.5
	Howell-E	31.7						
					Thomas-E	4.1		
			Butts	9.5	Phillips	2.7		
	Banks	2.3			Leafe-E	1.7		
1982	Andrews-E	79.9					Green-E	88.2
(4)	Staylor-E	75.3					Butts	87.6
	Summers-E	72.1						
	Ryan	41.1						
			Green-E	31.1				
			Butts	11.2			Gay	29.6
							Collins	27.5
			Gay	4.1	Andrews-E	5.8		
			Collins	2.6	Summers-E	2.1		
					Staylor-E	1.6		
					Ryan	0.9		
1984	Leafe-E	86.3					Foster-E	79.9
(3)	Howell-E	68.8					Butts	72.1
					Howell-E	39.8		
			Foster-E	26.6				
			Butts	24.2				
	Armstrong	20.7						
					Leafe-E	19.6		
					Armstrong	2.1		
1986	Andrews-E	72.6					Green-E	90.3
(4)	Fraim-E	67.0					Harris	84.1
	Wright	60.3			Andrews-E	38.4		
	Phillips-E	50.3			Hailey	34.2		
	Hailey	30.8			Fraim-E	29.8		
					Phillips-E	29.3		
			Green-E	27.3	Wright	3.8		
			Harris	4.8				